No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case turns on whether an investigator of the NASA-OIG is a "representative of the agency" within the meaning of the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7114(a)(2)(B).[1] As we demonstrate in our opening brief, a "representative of the agency" in Section 7114(a)(2)(B) must be a representative of agency *management*, and the Inspector General cannot be such a representative because of the independence conferred on him by the

[1] All parties agree that the relevant "agency" in this case is NASA. Contrary to the suggestion of AFGE (Br. 24-25), petitioners do not contend otherwise.

Inspector General Act, 5 U.S.C. App. 3. Respondents' contrary arguments fail to appreciate the fundamental independence of an Inspector General from agency management.[2]

1. The FLRA appears to agree that a "representative of the agency" must be a representative of agency management, as opposed to just another employee.[3] See Pet. App. 40a-41a (term does not exclude "management personnel employed in other subcomponents of the agency"); FLRA Br. 16, 21-28. Indeed, that proposition follows from the text and structure of the FSLMRS: the statute itself governs labor-management relations in the federal sector, and the section at issue here (7114) is captioned the "[r]epresentation rights and duties" of labor and management.[4] Neither respondent contests that, in all three places in the FSLMRS in which the words "representative of the

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[2] As we explain in our opening brief (at 39-40), the FLRA's determination is not entitled to deference, because it erroneously construed the FSLMRS and—more important—because it failed to consider adequately the implications of the Inspector General Act for the question whether the Inspector General can be a "representative of the agency."

[3] Neither respondent appears to contend that the procedures of Section 7114(a)(2) govern one co-worker's attempt to question another about some matter the resolution of which could ultimately result in disciplinary action. A co-worker acting on his own initiative is not a "representative of the agency" within the meaning of the statute, because a co-worker does not represent agency management.

[4] Contrary to the suggestion of AFGE (Br. 28), we do not contend that, in order to be a representative of the agency in a Section 7114(a)(2)(B) examination, a questioner must also be the agency's collective bargaining representative. But the questioner must *represent* agency management, which an OIG agent does not do.

agency" appear, the statute addresses the relationship between management and those employees who are given rights under the FSLMRS arising out of the collective bargaining relationship between labor and management. See 5 U.S.C. 7103(a)(12), 7114(a)(2)(A) and (B); see also Pet. Br. 18-19.

2. Respondents' fundamental error is to assert that an Inspector General is part of, or represents, agency management for purposes of applying Section 7114(a)(2)(B). The express purpose of the Inspector General Act was to create investigative units "independent" of agency management. See 5 U.S.C. App. 3 § 2. Although the FLRA is correct that the Inspector General Act does not provide "absolute autonomy" from agency management (Br. 33), numerous provisions of the Inspector General Act demonstrate that Congress intended an Inspector General to have sufficient independence to prevent an OIG agent from being a "representative of the agency" for purposes of Section 7114(a)(2)(B). For example, no agency manager can exercise authority over OIG functions. 5 U.S.C. App. 3 § 3(a). The head of the agency can neither compel an OIG to undertake a particular investigation nor direct how it will be conducted. See 5 U.S.C. App. 3 § 3(a); Pet. Br. 26. And the Inspector General has autonomy to "make such investigations * * * as are, in the judgment of the Inspector General, necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2).

Contrary to AFGE's contentions (Br. 14, 30-31), the fact that an OIG is under the "general supervision" of the agency head, 5 U.S.C. App. 3 § 3(a), does not give that officer any power to regulate the OIG's activities, compel the OIG to engage in collective bargaining with agency employees, or require the OIG to comply with investigative procedures collectively bargained by

agency management with its unions. See *NRC* v. *FLRA*, 25 F.3d 229, 235 (4th Cir. 1994) ("general supervision" provided by the statute is only "nominal"). Indeed, Congress placed OIGs under the "general supervision" of the agency head only to overcome concerns that the Inspector General's work might be "significantly impaired if he does not have a smooth working relationship with the department head." S. Rep. No. 1071, 95th Cong., 2d Sess. 9 (1978). Moreover, because the Inspector General derives authority to investigate from the Inspector General Act and not from the agency head, an Inspector General conducts investigations only because he has chosen to do so and not because of any authority delegated by the agency head. See Pet. Br. 26; 5 U.S.C. App. 3 §§ 2(1), 4(a).[5]

Respondents correctly note that agency management has wide discretion to designate a person as a "representative of the agency," whether for purposes of collective bargaining or for the discussions and examinations that are the subject of Section 7114(a)(2). FLRA Br. 27; AFGE Br. 14. Contrary to the FLRA's suggestion (Br. 27-28), petitioners do not dispute that anyone designated by agency management to conduct investigatory interviews of federal employees would be

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[5] The FLRA mistakenly suggests that an Inspector General is part of agency "management" for purposes of applying Section 7114(a)(2)(B) because the Inspector General provides policy recommendations to agency management (Br. 32 n.15). To the contrary, while the Inspector General Act imposes a duty to make policy recommendations, which the agency head is not obliged to accept, see 5 U.S.C. App. 3 § 4(a)(1)-(3), the Act bars the OIG from participating in the actual "performance" of agency management functions. 5 U.S.C. App. 3 § 9(a) ("there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities").

a "representative" of management for that purpose. But agency management cannot designate the Inspector General for that function, because the Inspector General Act gives the Inspector General the independence to decide when and how to conduct investigations, free of influence from agency managers. See 5 U.S.C. App. 3 §§ 3(a), 6(a).[6]

Respondents erroneously contend that an Inspector General is not in fact independent of agency management because the Inspector General must rely on the power of agency management to compel an employee to attend an investigatory interview. FLRA Br. 38; AFGE Br. 4, 15-17, 36-37. Although the Inspector General relies on the assistance of management to command the presence of witnesses at interviews—or to request documents from another agency, 5 U.S.C. App. 3 § 6(b)(1)[7]—the Inspector General nonetheless functions completely free of management in deciding "when and how" to investigate. *DOJ*, 39 F.3d at 367 (quoting *NRC*, 25 F.3d at 234).[8] Indeed, the FBI, DEA, and all

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[6] Nor could the agency head designate the Inspector General as its representative for collective bargaining, because the Inspector General Act expressly precludes the Inspector General from engaging in policy or programmatic functions of which collective bargaining is a core type. See 5 U.S.C. App. 3 § 9(a).

[7] The AFGE reads that provision as pertaining to an OIG's request for documents from the agency within which it is established (Br. 37), but that reading is mistaken. See 5 U.S.C. App. 3 § 6(a)(1).

[8] AFGE contends that the OIG investigator here acted for NASA-HQ by threatening P with discipline if he did not cooperate. Br. 15 (citing Pet. App. 19a). The OIG has no authority to discipline an agency's employees. It can merely report an employee's noncooperation to agency management, for such action as management chooses to take.

other law enforcement agencies also rely on management to compel an employee to appear at an interview, but that fact does not transform those entities into "representatives" of agency management.[9]

Nor does an Inspector General become a "representative of the agency" simply because an OIG investigation provides a benefit to the agency. See FLRA Br. 47; AFGE Br. 31-32. Congress intended the Inspector General to serve the agency's interests by establishing an independent watchdog within the agency that would provide candid management advice, conduct audits of agency programs, and investigate wrongdoing by agency employees and third parties that did business with agencies. The fact that an OIG may provide investigative information to agency management (FLRA Br. 22; AFGE Br. 14-15) does not make an Inspector General a "representative of the agency" for purposes of the statutory *Weingarten* rule, just as the FBI, DEA, and local police departments do not become representatives of the agency when they provide investigative information to agency management about the wrongdoing of a federal unionized employee. See Pet. Br. 42-43. Thus, the fact that the agency benefits from the OIG's investigation does not transform an OIG investigation into one "authorized [by] the establishment." AFGE Br. 32.[10]

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[9] The FLRA is also mistaken in its suggestion that the independence of an Inspector General is undercut by limitations imposed by the Privacy Act and the appropriations process (Br. 33-34). Those limitations apply to all Executive Branch entities, and do not provide a basis for distinguishing between independent and dependent entities.

[10] Respondents argue that an OIG investigator is a representative of an agency under 5 U.S.C. 555(b), which provides a right to counsel for a "person compelled to appear in person before an

Finally, the fact that information obtained in an OIG investigation may be used by agency management in a disciplinary inquiry does not make the OIG investigator a representative of management. Upon receipt of an OIG investigative report, agency management may take no action, conduct further factual investigation, or initiate disciplinary proceedings. Any interviews conducted by agency management representatives would be subject to Section 7114(a)(2)(B). And in the disciplinary process itself, an employee has a broad range of procedural and representational rights that are

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agency or representative thereof," and therefore the OIG investigator must also be a representative of the agency under 5 U.S.C. 7114(a)(2)(B) (FLRA Br. 36-37; AFGE Br. 17 n.4). They are mistaken on both counts.

First, it is doubtful that Section 555(b) applies to OIG investigative interviews. Section 555(b) is part of the Administrative Procedure Act (APA), which concerns rulemakings, adjudications, and other agency proceedings, and not law enforcement investigations like those conducted by the OIG. In any event, Section 555(b) applies only when a person is "compelled to appear," which is not the case in most OIG interviews, including this one (see Pet. App. 61a).

Second, even if Section 555(b) does apply to OIG interviews and the OIG investigator is a "representative" of "an agency" for that purpose, it does not follow that an OIG investigator is also a "representative of the agency" within the meaning of Section 7114(a)(2)(B). The APA and the FSLMRS define "agency" differently. Compare 5 U.S.C. 551(1) ("each authority of the Government of the United States, whether or not it is within or subject to review by another agency") with 5 U.S.C. 7103(a)(3) (1994 & Supp. II 1996) ("Executive agency"). Thus, the OIG itself may be an agency under the APA, and not under the FSLMRS (see AFGE Br. 25 & n.8; FLRA Br. 20). And an OIG investigator who interviews an employee may thus be a "representative" of "an agency" (the OIG) for purposes of the APA, but not a "representative" of the employee's agency (in this case NASA) for purposes of 5 U.S.C. 7114(a)(2)(B).

unaffected by resolution of the issue in this case. See 5 U.S.C. 7501 *et seq.*; 5 C.F.R. Pt. 752. Those possibilities, however, do not transform an OIG investigation into an act of a management representative.

3. Respondents and amicus NTEU seem to argue that Section 7114(a)(2)(B) is designed to protect an employee from *any* action that may lead to discipline (FLRA Br. 29; AFGE Br. 17-18; NTEU Br. 10), but in fact there is no basis for such a broad claim. Like the *Weingarten* right on which it is modeled, Section 7114(a)(2)(B) regulates the relationship between labor and management in the context of a collective bargaining relationship. It does not give employees rights in interviews by police officers or co-workers, notwithstanding the potential for discipline in such cases, but only gives them rights in interviews by representatives of management.

The statutory *Weingarten* right in Section 7114(a)(2)(B) is part of the cluster of rights and duties that flows out of the collective bargaining relationship between agency management and employees covered by the FSLMRS.[11] The courts of appeals have uniformly concluded that the rights and duties of Section 7114 are limited to the persons and entities who have

[11] The representational rights in Section 7114(a)(2)(B) are not absolute: the employee must request them and the interviewer is not obligated to advise the employee of their existence; if an "exclusive representative" has not been designated, the interviewer is not required to permit a union representative to participate in the interview; and federal workers that fall outside the definition of "employee" (5 U.S.C. 7103(a)(2)) or are excluded from the bargaining unit (5 U.S.C. 7112(b)) are not entitled to invoke them.

such a collective bargaining relationship.[12] In *United States Department of Veterans Affairs* v. *Federal Labor Relations Authority*, 1 F.3d 19 (D.C. Cir. 1993) (R. Ginsburg, J.), for example, the court held that the FLRA could not compel an agency to comply with disclosure obligations under 5 U.S.C. 7114(b), in the absence of a collective bargaining relationship between labor and management. As the court summarized its holding: the "requirement of collective bargaining is critical to the information right described in 5 U.S.C. § 7114(b)(4)(B). Because the VA medical personnel involved in this case had no information-rights-generating collective bargaining agreement with the agency, and no statutory right to engage in collective bargaining, the FLRA's [disclosure] order is unauthorized by the FSLMRS." 1 F.3d at 23 (footnotes omitted).

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[12] Every right in Section 7114 flows out of the collective bargaining relationship. Section 7114(a)(1) specifies what the "labor organization which has been accorded exclusive recognition [and] is the exclusive representative of the employees in the unit" is entitled to do; Section 7114(a)(2) specifies when the "exclusive representative" may be "represented" at discussions or examinations conducted by "representatives of the agency"; Section 7114(a)(3) requires the agency annually to inform "employees" (as defined in Section 7103(a)(2)) of their representation rights; Section 7114(a)(4) requires an agency and the exclusive representative to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement"; and Section 7114(a)(5) provides that the "rights of an exclusive representative" shall not preclude an employee from other rights of representation. Section 7114(b) provides the requirements of "good faith" that the "exclusive representative" and agency must exhibit in their negotiations. Section 7114(c) provides for the "head of the agency" to approve an "agreement" between the "agency and an exclusive representative."

The same limitation of Section 7114 rights to the collective bargaining relationship has been sustained to permit unions to avoid representing non-member employees of the bargaining unit in certain contexts. See *American Fed'n of Gov't Employees* v. *FLRA*, 812 F.2d 1326, 1328 (10th Cir. 1987) (union's duty of fair representation of all employees within bargaining unit [5 U.S.C. 7114(a)(1)] is coterminous with union's power as exclusive representative and does not require union to represent nonmember employee who was entitled to choose representative other than union on appeal of his case); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165, 1169-1170 (D.C. Cir. 1986) (obligation of fair representation imposed on union depends on existence of collective bargaining relationship). Since the representation rights and duties of Section 7114(a)(2), like those of Section 7114(a)(1), also depend on the existence of a collective bargaining relationship, the text and intent of the FSLMRS do not support the FLRA's holding that an Inspector General must afford union representational rights in interviews by OIG investigators, who do not represent management. See Pet. Br. 43.

4. Respondents suggest that because Postal Inspectors were treated as representatives of the United States Postal Service by several NLRB decisions and a D.C. Circuit opinion, therefore so too an Inspector General should be viewed as a representative of agency management. See FLRA Br. 28-30 (citing *Eddie L. Jenkins*, 241 N.L.R.B. 141 (1979); *Ralph Bell*, 288 N.L.R.B. 864 (1988); and *United States Postal Serv.* v. *NLRB*, 969 F.2d 1064 (D.C. Cir. 1992) (R. Ginsburg, J.) (*USPS*)); see also AFGE Br. 19-23. That analysis is mistaken.

The issue in *USPS* was whether the *Weingarten* right "cover[ed] pre-interview consultation between employee and union representative." 969 F.2d at 1066. The NLRB held that it did, and in upholding that construction, the court had no reason to question the applicability of *Weingarten* rights to interviews by postal inspectors—those rights had long been recognized by the Postal Service and they were expressly recognized in the collective bargaining agreement. *Ibid.*[13]

The analogy respondents seek to draw from the case is inapposite, because the postal inspectors in *USPS* were not OIG personnel and lacked the statutory independence that Congress has conferred on the OIGs. The postal inspectors were Postal Service employees and agents, *USPS*, 969 F.2d at 1066, and although not "under the supervision or direction of postal supervisors or managers" (AFGE Br. 22 (quoting *Ralph Bell*, 288 N.L.R.B. at 865)), they reported to and were under the supervision of the Postmaster General (*ibid.*). In that respect they were just like the management-directed internal affairs investigators whose lack of independence led Congress in 1978 to enact the Inspector General Act (see Pet. Br. 4).[14]

Thus, the decision about postal inspector interviews in *USPS* had no necessary implications for OIG interviews, as the court implicitly recognized when it ultimately held that OIG interviews are not subject to

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[13] The Postal Service is regulated under the National Labor Relations Act, not the FSLMRS. See 39 U.S.C. 1209.

[14] By contrast, OIGs are created separately and independently from the agency and Inspectors General have authority to hire and fire their own staffs. See generally Pet. Br. 25 & n.12, 25-33; 5 U.S.C. App. 3 § 6(a)(7).

Section 7114(a)(2)(B). See *DOJ*, 39 F.3d at 361.[15] Indeed, four years after the D.C. Circuit's decision in *USPS*, Congress created an Office of the Inspector General for the Postal Service and thereby explicitly differentiated the independence of investigators who report to the Inspector General from that of investigators in the Inspection Service who report to the Postmaster General. See 5 U.S.C. App. 3 § 8G(f)(1) (Supp. II 1996).

The FLRA appears to argue that postal inspectors are so similar to OIG investigators that similar treatment is required under the FSLMRS (Br. 42 n.20), but that argument overlooks the critical distinction between an independent investigative entity and an internal security unit controlled by management. Many agencies had their own internal security personnel before the establishment of OIGs, but the Inspector General Act created an independent entity within the agency with a different status for its investigative agents. See 5 U.S.C. App. 3 § 9 (transferring functions of various internal security offices to the Office of Inspector General established within the named agencies).[16]

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[15] Judge Randolph, who had joined the court's opinion in *USPS*, was the author of the *DOJ* decision, thus suggesting that he discerned no conflict between applying *Weingarten* rights to interviews conducted by management-supervised investigative agents and disallowing such rights in interviews conducted by OIG agents.

[16] Neither respondent contests the observation in our opening brief (at 21-22 & n.9) that private-sector *Weingarten* rights do not recognize a right to union representation when an employee is interviewed by a law enforcement agency, such as the FBI. Just as an FBI investigation in the private sector context is not

Contrary to the suggestion of amicus NTEU (Br. 14-15), there is nothing implausible about the fact that in 1978 Congress extended *Weingarten* rights to federal employees in interviews conducted on behalf of agency management, and at the same time established independent investigative units whose activities are not directed by management and not subject to *Weingarten* rights.[17] Agencies that have OIGs do not cease to conduct internal investigations directed by management; indeed, they maintain internal affairs units precisely so that agency managers can address employee misconduct that the Inspector General (because of resource constraints or investigative priorities) chooses not to investigate.[18] A unionized employee may request union

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controlled by management, so too here an OIG investigation is not controlled by an agency's management.

[17] Contrary to NTEU's assertion (Br. 14), creation of an Inspector General in an agency did not and does not "repeal" any rights under Section 7114(a)(2)(B). Those rights apply in any management-directed interview when requested by an employee who reasonably fears disciplinary action. Rather, by creating independent OIG investigative units, Congress provided that, when an Inspector General conducts the interview, Section 7114(a)(2)(B) does not apply, since the Inspector General is not part of "management" for that purpose. Congress could have achieved the same result by transferring management-directed internal affairs units to the FBI, but it chose instead to create independent Offices of Inspector General that would conduct investigations and audits of agency programs. (Notably, the FLRA has not adopted the NTEU's argument.)

[18] See, *e.g.*, 8 C.F.R. 103.1(e) (Immigration and Naturalization Service creation of Office of Internal Audit "to conduct or direct the conduct of investigations of alleged misconduct by Service employees, subject to agreements" with the Department's Office of Inspector General); 60 Fed. Reg. 22,100, 22,130, 22,133 (1995) (contrasting duties of Office of Labor Management Relations and Office of Program and Integrity Reviews with Office of Inspector

representation pursuant to Section 7114(a)(2)(B) when an internal affairs unit conducts the investigative interview. When an OIG agent conducts the interview, however, concerns that management will use the investigative process to interfere with rights collectively bargained by the union are not present, so the employee is not entitled to request union representation.[19]

5. Respondents understate the extent to which the rule announced below conflicts with specific provisions of the Inspector General Act that ensure the Inspector General's independence.

a. Attendance of a union representative at an OIG interview interferes with the confidential reporting and

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General in Social Security Administration); *id.* at 4417 (describing Food and Drug Administration Office of Internal Affairs and investigative liaison function with Department of Health and Human Services OIG).

[19] Thus, while the AFGE cites references in the legislative history of the FSLMRS to the *Weingarten* rule in interviews by an agency's internal security force (Br. 19-23), those references provide no support for the application of the rule to investigators of a new and independent Office of Inspector General. NTEU's reliance (Br. 13) on a predecessor version of Section 7114(a)(2)(B), sponsored by Representative Clay, is also misplaced. See also AFGE Br. 20-22. That version preceded the Udall compromise that became the bill that was enacted into law. See Pet. Br. 23-24 n.10. Accordingly, the predecessor version and the discussion surrounding it are of little value in understanding the intent behind the FSLMRS, as enacted. Representative Clay was a reluctant supporter of the Udall Amendment, see 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978), reprinted in *Legislative History*, *supra*, at 930-931, and this Court has emphasized that the views of legislators who seek a more restrictive wording should not control the interpretation of a statute that was the result of a compromise like the FSLMRS. *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 11 (1968). Notably, the FLRA has not relied on the predecessor version or the legislative history cited by the AFGE and NTEU.

nondisclosure obligations imposed by the Inspector General Act. See Pet. Br. 33-34. Respondents suggest that there is no general duty of confidentiality (FLRA Br. 34, 36; AFGE Br. 34), and that in any event, necessary confidentiality can be protected by negotiation in the collective bargaining process of appropriate confidentiality provisions (FLRA Br. 37; AFGE Br. 35). Both arguments are mistaken.

The duty of confidentiality is found in several provisions of the Inspector General Act. First, the OIG must report directly to the Attorney General (and not to the agency head) if the OIG finds reasonable grounds to believe there has been a violation of federal criminal law. 5 U.S.C. App. 3 § 4(d). The rationale behind that provision is to maintain confidentiality within the agency and to ensure prompt handling of the matter without political interference from agency managers. See S. Rep. No. 1071, *supra*, at 30. Second, the Inspector General Act expressly requires the Inspector General to maintain the confidentiality of information in a criminal investigation, see 5 U.S.C. App. 3 § 5(e)(1), and to avoid disclosing the identity of the employee who provided information to the Inspector General regarding possible violations of law, see 5 U.S.C. App. 3 § 7(b).[20]

The FLRA misses the point when it asserts (Br. 36) that a union representative might, by clarifying the facts, assist the OIG in preparing a more accurate report, since providing assistance by attending the interview is inconsistent with the duty of confidentiality. Nor can the obligation of confidentiality be safeguarded through provisions negotiated in collective bargaining,

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[20] Citation to those provisions was inadvertently omitted from our opening brief. See AFGE Br. 33-34.

as respondents suggest. See FLRA Br. 37; AFGE Br. 35. Because an OIG is excluded from collective bargaining, it would be dependent on agency management to negotiate any such provision. Such dependency is entirely inconsistent with the statutory independence of the OIG, as the Fourth Circuit recognized in *NRC*, 25 F.3d at 229 (holding that agency head was not required to bargain over proposals pertaining to procedures for OIG investigations).

b. During the past decade, when the courts of appeals have disagreed over whether Section 7114(a)(2)(B) is applicable to OIG investigations, the FLRA has encouraged an expansive construction of that provision, resulting in uncertainty for OIG agents and interference with OIG control over investigations. In *DOJ*, 39 F.3d at 367, for example, the union representative sought the right to halt the interview in order to discuss answers to questions outside the hearing of the investigator. That "right" unquestionably interferes with the OIG's conduct of an investigation—by subjecting the investigator to external rules of procedure and by depriving the OIG of the frank and unrehearsed answers of the employee. The FLRA responds that it has recently decided that there is no per se right for the union representative and the employee to halt the investigation in order to step outside the room and consult regarding the answers to certain questions. Br. 40. The FLRA's response, however, highlights two points: the FLRA recognizes *some* right to halt an OIG interview, and OIGs will only know whether they have deprived a union representative of that "right" after they have been found guilty of an unfair labor practice.

The FLRA argues that the right to consult during or in advance of an interview is not disruptive and

"advances the purposes of *Weingarten*" (Br. 40), but that argument misses the point. The right to consult is necessarily disruptive in the sense that any external procedure imposed on the Inspector General interferes with his ability to decide how best to conduct an investigation. And while consultation might advance the *Weingarten* purpose of alleviating tensions and misunderstandings between labor and management when agency managers investigate employee misconduct, that objective has little relevance to an OIG investigation because an Inspector General is not an employer-manager of the interviewee.

c. The FLRA concedes that if this Court accepts its construction, the scope of *Weingarten* rights will be subject to wider and wider expansion in collective bargaining negotiations. Br. 43 (petitioners' "point [at Pet. Br. 37-38] is correct"). Accordingly, the full extent of the rule's impact on the OIG's investigative independence is not now knowable.[21] Because the FSLMRS gives unions the power to negotiate to impasse in order to have their proposals imposed on the agency, see 5 U.S.C. 7119(b) and (c), an OIG's freedom to investigate wrongdoing by unionized employees could be sharply curtailed.

It is no answer that the agency can negotiate in this area, or ultimately seek judicial review of any adverse resolution of a dispute by the FLRA. See FLRA Br. 43. As noted above, it is fundamentally inconsistent with the independence of the Inspector General to make the OIG dependent on agency management to

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[21] The FLRA seemingly acknowledges (Br. 39) an uncertain scope to the rule, but notes that it is not boundless and that the FLRA "has recognized limits on a union representative's participation in section 7114(a)(2)(B) examinations."

negotiate about OIG investigative procedures. See p. 14, *supra*. Affording agency management that kind of leverage over an Inspector General is inconsistent with the text and purposes of the Inspector General Act.[22]

d. The requirement of union representation at investigative interviews creates special problems in criminal investigations conducted jointly by an OIG with other law enforcement agencies. Pet. Br. 36. Law enforcement agencies are likely to decline collaboration with an OIG if the latter's presence carries with it the obligation to comply with the *Weingarten* rule, as the FLRA has opined that it does. See, *e.g.*, *AFGE Local 3316*, 35 F.L.R.A. 790, 802 (1990) (*Weingarten* rule applies to FBI investigatory interview where OIG investigator was also present and participated in the interview because the information obtained from the employee "could, and in all probability would," be forwarded to the agency).

The FLRA acknowledges a potential problem in criminal investigations (Br. 43), notes that "virtually any workplace matter being investigated involves conduct that could be characterized as a crime" (Br. 44), and contends that the FLRA and the courts of appeals can solve the problem by determining on a case-by-case basis whether the *Weingarten* right should apply. (Br. 43). The result of such a regime, however, will be to leave OIG investigators without guidance, requiring them to guess when and whether the FLRA will

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[22] Moreover, if investigative procedures were subject to collective bargaining, the result would be to create grave practical problems for OIG agents, who would be required to know the nuances of collective bargaining agreement provisions contained in dozens (and even hundreds) of agreements with the agency before they could conduct an interview in a manner that would not subject them to an unfair labor charge. See Pet. Br. 6.

impose an unfair labor charge if the Inspector General restricts the participation of a union representative. That uncertainty is intolerable where, as here, the OIG cannot be certain before the interview whether its investigation of the facts will culminate in a criminal prosecution or disciplinary proceedings.[23] The price of the FLRA's uncertainty is made even higher by the fact that it has created an exclusionary rule to enforce the statutory *Weingarten* provision—evidence of wrongdoing by an employee cannot be used for discipline if the evidence was obtained in violation of the rule. See *AFGE Local 1917*, No. BN-CA-50149, 1996 WL 560250, at *9 (FLRA July 30, 1996) (ALJ found DOJ-OIG to have violated *Weingarten* right and enjoined agency from using information gathered at interview to support any disciplinary action), rev'd *sub nom. FLRA* v. *United States Dep't of Justice*, 137 F.3d 683 (2d Cir. 1998), petition for cert. pending, No. 98-667.

6. In arguing that NASA-HQ is responsible for any unfair labor practice that may have been committed by NASA-OIG, the FLRA concedes (Br. 46) that "NASA-HQ may not prevent NASA-OIG from initiating, carrying out, or completing an audit or investigation" but argues that "the IG Act gives no indication that an

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[23] Taking a sentence from the OIG's testimony before the ALJ, the FLRA (Br. 6 n.4) and the court of appeals (Pet. App. 23a-24a n.12) have drawn the erroneous conclusion that the OIG agent's belief prior to the interview that P had not committed a prosecutable crime was somehow dispositive in making the interview part of an administrative disciplinary investigation as opposed to a criminal probe. The agent's belief prior to the interview was necessarily subject to modification as a result of facts learned in the interview or otherwise. It would be unworkable to make the application of Section 7114(a)(2)(B) turn on the decision (made *after* an interview) whether to refer a matter for prosecution.

agency head is prohibited from directing the OIG to comply with a federal statute." Yet as this case demonstrates, there may be a substantial difference of opinion about the proper construction of the relevant statute. Because an agency head does not have the authority to tell an Inspector General how to conduct an audit or investigation, see 5 U.S.C. App. 3 § 3(a), agency headquarters should not be liable if an Inspector General adheres to an interpretation that is ultimately rejected by the courts. See Pet. Br. 47-48. Nor does the fact that an Inspector General's work ordinarily produces some benefit to the agency change that result (FLRA Br. 47), in light of the fact that an Inspector General conducts his own investigation, and not the agency's. See p. 3, *supra*; Pet. Br. 44-45.

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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